

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TERRY STAFFORD, OFFICER OF LONG WHARF CORPORATION	:	DETERMINATION DTA NO. 811207
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1988 through November 30, 1988.	:	

Petitioner, Terry Stafford, officer of Long Wharf Corporation, 26 Middle Drive, Huntington, New York 11743, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1988 through November 30, 1988.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on July 19, 1993 at 1:15 P.M. The Division of Taxation was allowed until July 26, 1993 to submit an additional document into the record. The Division of Taxation was allowed until September 13, 1993 to file a brief and petitioner was allowed until October 11, 1993 to file a brief. Neither party filed a brief. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

ISSUES

I. Whether a default determination should be issued against the Division of Taxation for its failure to file its answer within the time prescribed in the Rules of Practice and Procedure.

II. Whether petitioner has shown that all or part of the assessment at issue was paid by Long Wharf Corporation.

III. Whether the Division of Taxation properly assessed petitioner as a person responsible to collect tax on behalf of Long Wharf Corporation pursuant to Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

On June 7, 1991 the Division of Taxation ("Division") issued to petitioner, Terry Stafford, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed \$11,404.48 in tax due, plus penalty and interest for the period September 1, 1988 through November 30, 1988. The notice stated that petitioner was liable "individually and as officer of Long Wharf Corp. under Sections 1131(1) and 1133 of the Tax Law."

Long Wharf Corporation operated a restaurant called Wings Point Restaurant located in East Hampton, New York. Long Wharf Corporation was formed in 1985 to own and operate Wings Point Restaurant. Petitioner was a 25% shareholder in the corporation. Two other individuals, William Long and Anita Long, husband and wife, owned the remaining 75% of the shares. Petitioner was president of the corporation. William Long was secretary-treasurer and Anita Long was vice president.

Petitioner was also employed by the corporation as the general manager of the restaurant. As general manager petitioner was responsible for the daily supervision of the restaurant's staff, which ranged from about 50 employees during the summer season to about 10 during the fall and winter. Petitioner also oversaw all supply orders, counted nightly proceeds, made bank deposits, paid creditors and served as maitre d'.

During the period of his employment at the restaurant, petitioner signed all tax returns, including sales tax returns, filed by the corporation. The sales tax returns were prepared by a part-time bookkeeper. Petitioner also had the check-signing authority. He signed all checks for payment of taxes, including sales taxes; he signed payroll checks; he signed checks for payment of creditors.

Petitioner signed a standard form financing statement (Form UCC-1) on behalf of the corporation for property and equipment used in the restaurant. Said financing statement was filed in the Suffolk County Clerk's office on September 14, 1988.

Petitioner's employment as general manager of the restaurant ceased as of October 28, 1988. His involvement in the day-to-day affairs of the restaurant ceased as of that date.

Petitioner continued to hold the title of corporate president until July 20, 1989, when he signed a Stock Redemption Agreement pursuant to which he agreed to sell his stock back to Long Wharf Corporation. He further agreed, pursuant to this agreement, to resign as president of the corporation; to withdraw any personal guarantees related to the business; to surrender any claim to work for the business; to place his stock in escrow with delivery to the corporation upon full payment; and upon full payment, to release the corporation of any obligation to him. The Stock Redemption Agreement also provided that the corporation would hold petitioner harmless for any tax liability not to exceed \$30,000.00 assessed for the period prior to October 31, 1988, and to hold petitioner harmless for any amount of taxes due for any subsequent period.

Petitioner's departure from the restaurant was caused by the restaurant's financial difficulties and by his belief that his fellow shareholders were not living up to their informal agreement to loan the business sufficient funds to keep it operating. Petitioner's decision was also influenced by what he perceived as the restaurant's landlord's failure to give the corporation proper rental credits for improvements made by the corporation to the restaurant's premises. Petitioner's belief that the restaurant and he were being treated unfairly or inequitably was influenced by the fact that Mr. Long was a shareholder of the entity which acted as the the restaurant's landlord.

The sales taxes at issue were not paid because of the corporation's financial difficulties. Such difficulties also caused petitioner to refrain from cashing his own weekly paycheck for the final six weeks of his employment. Both the decision not to pay sales tax and not to cash his weekly paychecks were made to enable the restaurant to continue operating.

At the time of the formation of the corporation, petitioner loaned the corporation approximately \$50,000.00. According to petitioner, William and Anita Long agreed at that time to loan the corporation sufficient funds to keep the restaurant operating since the corporate officers believed that the restaurant would operate at a loss for a period of time.

Petitioner ultimately loaned the corporation about \$72,000.00. Additionally, petitioner personally guaranteed loans made by financial institutions to the corporation.

For the sales tax period at issue, the corporation filed part-quarterly returns for the months of September and October 1988, and a quarterly return for the quarter ended November 30, 1988. Said returns were dated October 19, 1988, November 18, 1988, and December 19, 1988, respectively. Said returns were filed without payment and indicated a total of \$11,404.48 in sales tax due for the quarter.¹ There is no evidence in the record of the filing dates of these returns.

Petitioner's purported signature appears on all three returns filed by the corporation for the period at issue. Petitioner denied that any of the signatures appearing on the three returns were his.

Petitioner submitted into evidence a letter dated June 28, 1992, from a Patricia Siegel, identified as a "handwriting examiner". The letter was written on the letterhead of "Patricia Siegel Enterprises, Inc. Handwriting Examination"² and stated, as follows:

"At this time I am able to give a preliminary opinion on two of three signatures presented for examination.

"My preliminary opinion is that the questioned Terry Stafford signatures on Sales and Use Tax Return forms dated 10/19/88 and 12/19/88 are not his genuine signatures. This opinion is conditional based on seeing the original documents for confirmation of findings.

"I have not yet come to a conclusion regarding the third questioned signature on another tax form dated 11/18/88. I will need to see the original document to make even a preliminary determination in this instance. Several letter forms are not clearly decipherable on the photocopy available for examination.

"I will also require additional known standards of Terry Stafford's writing and signatures to complete the evaluation of the 11/18/88 questioned signature as it differs somewhat from the other two questioned signatures."

¹The September part-quarterly return reported \$7,632.51 in tax due. The October part-quarterly reported \$4,492.00 in tax due. Since the quarterly return indicated \$11,404.48, it is determined that \$279.97 in sales tax liability accrued during November 1988.

²Petitioner had hired a private investigation service in an effort to establish that the disputed signatures were not his. The private investigator had, in turn, hired Patricia Siegel Enterprises, Inc.

No evidence regarding Ms. Siegel's qualifications to render opinions on the genuineness of signatures is contained in the record.

Based upon a review of the disputed signatures and of the many concededly genuine examples of petitioner's signature contained in the record, it is concluded that the signatures on the September part-quarterly return dated October 19, 1988 and the quarterly return dated December 19, 1988 are clearly not that of petitioner. A review of the signature on the October part-quarterly return dated November 18, 1988 is inconclusive. It is noted that the Patricia Siegel letter is given little weight in reaching this conclusion since the record contains no evidence regarding Ms. Siegel's qualifications as a handwriting expert.

The Division of Tax Appeals acknowledged receipt of the petition in this matter by letter dated October 7, 1992. The Division's answer was dated December 14, 1992 and was filed on or about that date.

At hearing petitioner raised the question of whether the corporation had, at some point, paid all or part of the assessment at issue. In response, the Division introduced a printout of its assessment receivable record for the corporation for the period at issue. This record indicated an outstanding sales tax liability of \$11,404.48, plus penalty and interest, for the relevant period.

CONCLUSIONS OF LAW

A. At hearing petitioner moved for determination on default against the Division for its failure to file its answer within the time prescribed in the Regulations (see, 20 NYCRR 3000.4[a]). Petitioner's motion is hereby denied as untimely, for the regulations require that motions be made within 90 days after the service of a pleading by the adverse party (see, 20 NYCRR 3000.5[a]). Here, the answer was filed on or about December 14, 1992 and the motion for default was made at the hearing on July 19, 1993, well in excess of 90 days after the Division's filing. Moreover, even if timely, petitioner's motion still would be properly denied, for in the absence of prejudice to petitioner (and none has been alleged here), the late-filing of an answer by approximately 10 days, as is the case herein, does not warrant the relief sought by

petitioner in his motion.

B. With respect to the question raised by petitioner regarding whether the corporation paid all or part of the tax at issue, the record introduced by the Division indicated that no such payments were made and petitioner presented no evidence to the contrary. It is concluded, therefore, that no such payments were made by the corporation.

C. Tax Law § 1133(a) imposes personal liability for sales and use taxes on "every person required to collect any tax." Tax Law § 1131(1) defines "persons required to collect tax" as including:

"any officer, director or employee of a corporation . . . who as such officer, director or employee is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]."

D. Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities so that the individual would have personal liability for the taxes not collected or paid depends on the particular facts of the case (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564).

E. The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of the Tax Appeals Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; and the individual's economic interests in the corporation (Matter of Martin v. Commr. of Taxation & Fin., 162 AD2d 890, 558 NYS2d 239; Matter of Cohen v. State Tax Commn., supra, 513 NYS2d at 565; Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 538, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Matter of Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862, 865; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 429; Matter of Constantino, Tax Appeals Tribunal,

September 27, 1990; Matter of Baumvoll, Tax Appeals Tribunal, November 22, 1989; Matter of D & W Auto Serv. Center, Tax Appeals Tribunal, April 20, 1989).

F. In the instant matter, petitioner was the general manager of the restaurant, fully involved in and in charge of its day-to-day operations. He had check-signing authority and generally oversaw the payment of creditors. Whether he signed the returns for the period at issue or not (see, Finding of Fact "15"), he generally did sign sales tax returns (and other tax returns) on behalf of the corporation. He also signed checks in payment of sales taxes. Petitioner was also president of the corporation, owned 25% of its stock, had loaned the corporation approximately \$72,000.00 and had provided personal guaranties on corporate loans.

The record herein thus clearly indicates that petitioner was a responsible officer of Long Wharf Corporation. The record herein also establishes that petitioner's relationship with the corporation changed as of October 28, 1988. At that time, his employment as the general manager of the restaurant ended. From that point forward, until July 1989, petitioner's involvement with the corporation was limited to his status as a 25% shareholder and his nominal status as president. Accordingly, after October 28, 1988 it is concluded that petitioner was no longer a responsible officer of Long Wharf Corporation.

G. In accordance with the foregoing, the Division is directed to modify the subject notice of determination to reflect the termination of petitioner's status as a responsible officer following October 28, 1988. Specifically, the Division is directed to proportionately adjust the tax assessed with respect to October 1988, as reported on the part-quarterly returns for that month, to reflect petitioner's responsible officer status for the first 28 days of that month. The Division is further directed to cancel that portion of the assessment attributable to tax collected in November 1988 (see, Finding of Fact "11", footnote "1"). The notice is otherwise sustained.

H. As noted previously, the record herein indicates that petitioner did not sign two of the returns filed for the period at issue. As also noted above, however, whether petitioner actually signed the returns is not dispositive of the issue of responsible officer status, but is merely one

factor to be considered. In the present case, whether or not petitioner signed the returns for the period at issue, the record clearly shows that he was a responsible officer of the corporation until October 28, 1988.

I. Petitioner also contended that he was not in control of the corporation prior to October 28, 1988 and that the corporation was, in fact, in the control of the other two shareholders who owned, collectively, 75% of the stock. The record, however, contains no evidence showing that petitioner was prevented by these other shareholders from exercising his authority to act on behalf of the corporation. The record does indicate that the corporation was experiencing economic difficulties during the period at issue. Such economic difficulties are insufficient, however, to relieve petitioner of his duties under Tax Law §§ 1131(1) and 1133(a), (see, Matter of Dworkin Construction Co., Tax Appeals Tribunal, August 4, 1988).

J. The petition of Terry Stafford, officer of Long Wharf Corporation, is granted to the extent indicated in Conclusion of Law "G"; the Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 7, 1991 in accordance therewith; except as so modified, the notice is sustained.

DATED: Troy, New York
April 7, 1994

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE